12-1264(L)
12-1272(CON)

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 12-1264(L), 12-1272(CON)

JPMORGAN CHASE BANK, N.A., CITIBANK, N.A., ROYAL BANK OF SCOTLAND N.V., FKA ABN AMRO BANK N.V., BANK OF AMERICA CORPORATION, UBS AG, BANK OF AMERICA N.A.,

Defendants-Garnishees-Third-Party-Plaintiffs-Appellees,

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

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—v.—

LTU LUFTTRANSPORT-UNTERNEHMEN, LTU GmBH,
In Care Of Kirstein & Young PLLC,
1750 K Street, NW, Suite 200, Washington, DC 20006,

Consolidated-Third-Party-Defendant-Appellant,

BANCO BILBAO VIZCAYA ARGENTARIA, S.A. and
BANCO BILBAO VIZCAYA ARGENTARIA PANAMA, S.A.,

Claimants-Appellants,

ESTUDIOS MERCADOS Y SUMINISTROS S.L., PHILIPS
MEXICANA S.A. DE C.V., NOVAFIN FINANCIERE, S.A.,

Respondents-Appellants,

CAJA DE AHORROS Y MONTE DE PIEDAD DE MADRID,
PREMUDA S.p.A.,

Interpleaders-Appellants.

SHANGHAI PUDONG DEVELOPMENT BANK CO. LTD.,

Third-Party-Defendant-Appellant,

—v.—

JEANNETTE FULLER HAUSLER, as Successor Personal Representative of the Estate of ROBERT OTIS FULLER ("Bobby Fuller"), Deceased, on behalf of Thomas Caskey, as Personal Representative of the Estate of LYNITA FULLER CASKEY, surviving daughter of Robert Otis Fuller, JEANNETTE HAUSLER,

Plaintiffs-Third-Party-Defendants-Appellees,

BANCO SANTANDER S.A., CAJA MADRID, BANCO ESPANOL DE CREDITO, BANCO SANTANDER TOTTA, S.A., UNION BANCAIRE PRIVEE, BANCO CENTRAL DE VENEZUELA, BANCO DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA,

Respondents,

DRESDNER LATEINAMERIKA AG, FKA DRESDNER BANK LATEINAMERIKA AG, ABBOTT LABORATORIES, INC., PETROLEOS DE VENEZUELA, S.A., FUNDACION BENFICA NICOLAS S. ACEA, PABLO ALCAZAR, as Trustee of FUNDACION BENEFICA NICOLAS S. ACEA, MAYRA BUSTAMENTS, RENE SILVA, JR., as Trustee of FUNDACION BENEFICA NICOLAS S. ACEA,

Third-Party-Defendants,

Estate of ROBERT OTIS FULLER, FREDERICK FULLER, GRACE LUTES, IRENE MOSS, FRANCES FULLER,

Plaintiffs-Third-Party Defendants,

SAN PAOLO BANK S.A., ING BANK N.V.,

Claimants,

REPUBLIC OF CUBA, FIDEL CASTRO RUZ, Individually, as First Vice President of the Council of State and Council of Ministers and Head of the Cuban Revolutionary Armed Forces, CUBAN REVOLUTIONARY ARMED FORCES, EL MINISTERIO DEL INTERIOR,

Defendants-Third-Party Defendants.

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BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Introduction and Interest of the United States

In accordance with Fed. R. App. P. 29(a), the United States submits this *amicus curiae* brief to address an issue of importance to the Government: whether the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (2002), authorizes the attachment of assets that are not owned by a terrorist party. In the Government's view, the answer to this question is "no."

The United States emphatically condemns the killing of American citizen Robert Otis Fuller that gives rise to this action, and has deep sympathy for Mr. Fuller and his family members, who have pursued legal action against Cuba. The United States remains committed to aggressively pursuing those responsible for violence against U.S. nationals. The Government also, however, has a strong interest in ensuring that courts properly interpret TRIA.

TRIA operates against the backdrop of United States economic sanctions programs, which serve as an important tool for the conduct of foreign affairs and the

protection of national security. Sanctions programs that include blocking provisions may block all property in which a target individual, entity, group of individuals or entities, foreign government, or even an entire nation (including all of its citizens) have any interest of any nature whatsoever. *See, e.g.*, 31 C.F.R. §§ 515.201, 515.310, 515.512(c) (provisions of the Cuban Assets Control Regulations (the "CACR")). Normally, unless a person obtains a license from the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), that person is barred from attaching assets that are blocked. This licensing system lets the Executive Branch exercise control over access to blocked assets in order to effectuate U.S. policy interests. But when a blocked asset comes within TRIA's scope, TRIA overrides OFAC's regulations requiring that a license be obtained before the asset is attached. Accordingly, any judicial application of TRIA has important consequences for the Executive Branch's implementation of sanctions regimes in the national interest. Moreover, because TRIA affects foreign states and entities with assets in the United States, judicial interpretations of TRIA can have important consequences for foreign policy.

The district court erred by failing to give effect to a limitation contained in TRIA's text itself, which permits attachment or execution only against blocked property "of" the terrorist party against whom a terrorism victim holds a judgment. Both the plain meaning of the statutory text and case law construing similarly-worded statutes demonstrate that TRIA permits attachment only of assets in which the terrorist party or its agency or instrumentality has an ownership interest—and, contrary to the district court's ruling below, does not

extend so broadly as to permit attachment of *any* assets that are blocked under the relevant OFAC sanctions regulations, which by their own terms extend much more broadly, to any property in which the terrorist party has "any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 515.201(a).

Question Presented

Whether a party can use TRIA—which permits terrorism victims who are judgment creditors to attach blocked property "of" a terrorist party—to attach assets in which a terrorist party does not have an ownership interest.

Statement of Facts

A. Statutory and Regulatory Background

1. TWEA, IEEPA, and the Cuban Assets Control Regulations

The United States's economic sanctions programs generally arise under either or both of two statutes, which form the backdrop for the implementation of TRIA.

First, the Trading With the Enemy Act ("TWEA"), 50 U.S.C. app. § 1 *et seq.*, first enacted in 1917, authorizes the President in certain conditions to impose embargoes on foreign nations. *See generally Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of the Treasury*, 638 F.3d 794, 795-96 (D.C. Cir. 2011). In 1963 President Kennedy issued a proclamation imposing an embargo on all trade with Cuba pursuant to TWEA, and, pursuant to the

President's direction, the Secretary of the Treasury promulgated the CACR on July 8, 1963, codified at 31 C.F.R. Part 515. *See id.*; *see also DeCuellar v. Brady*, 881 F.2d 1561, 1563 (11th Cir. 1989). The CACR prohibit transactions that "involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 515.201(a). Cuba itself is designated under the CACR, as is "any national thereof." 31 C.F.R. § 515.305. The CACR were "grandfathered" and thus remain in force notwithstanding the 1977 amendment of TWEA to no longer apply to peacetime national emergencies. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 232 (1984).

Meanwhile, the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706, also grants the President broad authority to issue regulations that restrict or prohibit international trade where he declares a "national emergency" with respect to an "unusual and extraordinary" foreign policy, national security or economic threat to the United States. *See generally* 50 U.S.C. § 1701. Section 1702 grants the President broad sanctions powers, and section 1704 authorizes the promulgation of regulations to implement the statute.

2. TRIA

In 2002, Congress passed TRIA, Pub. L. No. 107-297, 116 Stat. 2322 (2002), *reprinted in relevant part at* 28 U.S.C. § 1610 note, which governs post-judgment attachment proceedings in certain cases

arising out of terrorist acts. TRIA's section 201(a) provides:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7) (2000)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). TRIA defines the term "blocked asset" to mean "any asset seized or frozen by the United States" under specified provisions of IEEPA or section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. § 5(b)). TRIA § 201(d)(2)(A).*

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* TRIA excludes from the definition of "blocked asset" certain property not at issue here, including property "subject to a license" issued by the United States "for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States," if the license was required by a statute other than IEEPA or the United Nations Participation Act of 1945. *See* TRIA § 201(d)(2)(B)(i). Certain categories of diplomatic or consular property are also excluded. *See*

Through section 201(a), TRIA permits attachment of property in certain cases where attachment might otherwise have been precluded by the sovereign immunity provisions of the Foreign Sovereign Immunities Act ("FSIA").* *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010); *Weininger v. Castro*, 462 F. Supp. 2d 457, 483-89 (S.D.N.Y. 2006). It also facilitates the ability of terrorism victims to attach blocked assets by allowing them to bypass the OFAC prohibition on transactions involving blocked assets absent an OFAC license. *See, e.g.*, 31 C.F.R. §§ 515.201, 515.310, 515.512(c) (CACR) (prohibiting attachment without a license); *id.* §§ 535.201, 535.310 (Iranian Assets Control Regulations) (same); *id.* §§ 594.201, 594.312, 594.506(d) (Global Terrorism Sanctions Regulations) (same).

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id. § 201(d)(2)(B)(ii).

* Under the FSIA, a "foreign state" is "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements, and by the exceptions to immunity in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. §§ 1604, 1609. Six years after it enacted TRIA, Congress amended the FSIA; the amendments revised the immunity provisions related to terrorist states, created an express cause of action against state sponsors of terrorism that engaged in terrorist acts, and created a new execution provision for plaintiffs who hold judgments under this revised statute. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1) & (b)(3)(D) (codified in relevant part at 28 U.S.C. §§ 1605A and 1610(g)).

B. Factual and Procedural Background

The plaintiffs are the estate and survivors of Robert Otis Fuller, an American citizen killed in Cuba by the Castro regime in 1960. Many years later, Plaintiffs sued in Florida state court, seeking money damages from Cuba and various Cuban government officials; in 2007, they obtained a default judgment in their favor for $100 million in compensatory damages plus $300 million in punitive damages. (JA 200, 220).* Plaintiffs next obtained an unopposed judgment from the United States District Court for the Southern District of Florida, giving full faith and credit to their state court judgment. (JA 242-43).

Plaintiffs then registered this federal default judgment in the United States District Court for the Southern District of New York. (JA 241). There, the plaintiffs filed a number of "turnover" petitions in an attempt to attach various assets held by several garnishees, namely, a number of banks with offices in New York, in partial satisfaction of the compensatory portion of their judgment. (*E.g.*, JA 230, 237, 238; *see also* TRIA § 201(a) (authorizing attachment "to the extent of any compensatory damages for which such terrorist party has been adjudged liable")). Generally, these petitions sought to use TRIA to attach certain

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* Citations in the form "(JA __)" and "(SPA __)" refer respectively to pages of the Joint Appendix (Dkt Nos. 76, 77 and 78) and Special Appendix (Dkt. No. 79) filed by Appellant Banco Bilbao Vizcaya Artentaria, S.A.

electronic funds transfers ("EFTs")*

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* This Court has provided the following explanation for how an EFT works:

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank[,] that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank[,] upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the

that the banks had deemed blocked under the CACR. (JA 230); *see* 31 C.F.R. § 515.201(a)-(b), (d) (blocking property transactions in which Cuba, or "any national thereof," had "any interest of any nature whatsoever").

In July 2010, several of the garnishee U.S. banks filed a motion to dismiss one of the turnover petitions insofar as it sought to attach EFTs that had originated from non-Cuban entities, and that had been destined for Cuban entities that used Cuban banks. (*See* JA 32-33 (district court docket entries)). The banks argued that under New York law, the proceeds of a blocked EFT are not assets owned by either the beneficiary or the beneficiary's bank. (JA 32 (docket entries), Dkt. No. 54 in S.D.N.Y. Case No. 09 Civ. 10289 (Memorandum of Law), at 8-12). In their view, that was dispositive because TRIA only authorizes the attachment of assets owned by the relevant terrorist party. (*Id.*).

> intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients.

Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd., 609 F.3d 111, 115 (2d Cir. 2010) (internal quotation marks omitted; alterations in original).

The district court, however, disagreed, and denied the banks' motion to dismiss in a published September 2010 decision. (JA 269), reported at 740 F. Supp. 2d 525 (S.D.N.Y. 2010). Focusing on the language "[n]otwithstanding any other provision of law" in TRIA's section 201, the court held that TRIA preempts state property law. (JA 282-85). In its stead, according to the court, TRIA had adopted the "definitions" of property contained within the CACR, which the court deemed to "establish Cuba's interests in specified assets," as distinguished from merely attaching "consequences to property interests defined elsewhere." (JA 283, 285). Further, the district court noted that TRIA defined the phrase "blocked assets" with reference to specific asset blocking statutes, including the statute under which the CACR were issued. (JA 285). The district court acknowledged (JA 296-97) that the United States had interpreted TRIA differently in its statement of interest in another recent case in the Southern District of New York, *Rux v. ABN-AMRO Bank, N.V.*, No. 08 Civ. 6588, but declined to give that determination any weight. (JA 297).

The district court in this action also recognized that its decision could impact non-Cuban third parties that might also claim an interest in the funds. (JA 307). But the court dismissed these concerns, observing that such parties had been free to seek a license from OFAC unblocking the relevant funds. (JA 308). Moreover, the banks were free to interplead third parties who might claim an interest in the EFTs, and the resulting interpleader proceedings could not only determine whether those parties' claims to the funds were superior to those of the plaintiffs, but could also

discharge the banks from any liability the banks might have to those parties. (JA 309).

In light of the district court's ruling, the banks proceeded to interplead numerous third parties. (JA 39, 312). Not all of these parties appeared in the case and answered the interpleader complaint, but the ones that did included a variety of non-Cuban banks and companies from various nations (the "Adverse Claimants").* (JA 46, 47, 48 (docket entries reflecting answers), 355, 364, 371, 380, 388, 298, 405). These Adverse Claimants contended that the blocked EFTs did not belong to Cuba or to any Cuban entity, for varying reasons including that some transfers allegedly did not even involve a Cuban would-be beneficiary but were blocked due to errors that presumably were in the payment instructions, while others allegedly were sent by banks that had since lawfully paid the intended Cuban counterparty such that no Cuban entity had any

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* As far as the proceedings relevant to the appeal are concerned, the answering companies were Banco Bilbao Vizcaya Argentaria Panama, S.A. (a Panamanian bank); Banco Bilbao Vizcaya Argentaria, S.A. (a Spanish bank); Caja de Ahorros y Monte de Piedad de Madrid (a Spanish bank); Estudios Mercados y Suministros S.L. (a Spanish corporation); LTU Lufttrasport Unternehmen GmbH (a German corporation); Novafin Financière, S.A. (a Swiss financial institution); Philips Mexicana S.A. de C.V. (a Mexican corporation); Premuda S.p.A. (an Italian corporation); and Shanghai Pudong Development Bank Co., Ltd. (a Chinese bank). (JA 133 (docket entries reflecting these parties' notices of appeal)).

present claim on the blocked funds. (*E.g.*, JA 393-94, 400-01, 410-13).

Plaintiffs in this action eventually moved for judgment on the pleadings both in the interpleader actions and on their petitions for the turnover of assets. (JA 63, 64 (docket entries)). The Adverse Claimants cross-moved for summary judgment, arguing (among other things) that under New York law the EFTs did not belong to any Cuban banks, and that TRIA did not preempt this aspect of state law. (JA 69, 70 (docket entries)).

The district court denied the Adverse Claimants' motions, and ordered that the EFTs be turned over to the plaintiffs. (SPA 1, 13, 55-56). The court acknowledged that since it had issued its previous decision in 2010, a different Southern District of New York judge had held (in a decision whose appeal is being heard in tandem with this one) that TRIA only reaches property owned by the terrorist party. (SPA 19, 23-26 (citing *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 11 Civ. 3283, 2011 WL 6155987 (S.D.N.Y. Dec. 7, 2011))). But the district court in this case rejected that reasoning as overly focused on TRIA's use of the word "of" (in the phrase "blocked assets of that terrorist party"). According to the district court, the word "of" served only to designate which sanctions program's blocking regulations created attachable blocked assets (*e.g.*, in this case, the CACR). (SPA 26-29). The district court also acknowledged the Supreme Court's intervening decision in *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 131 S. Ct. 2188 (2011), which construed the statutory phrase "invention of the contractor" under

patent law; the district court distinguished the case on the grounds that *Stanford* was a patent law case, and hence did not compel an equivalent conclusion in TRIA's very different context. (SPA 26-29).

The district court also rejected the Adverse Claimants' fact-specific arguments for why their claim to the EFTs was superior to the plaintiffs'. In the district court's view, TRIA's purpose was to provide compensation for victims of terrorism, and so victims of terrorism holding judgments "must be first in line." (SPA 32). The court further explained that this conclusion was unproblematic because the claimants had the opportunity to apply for an OFAC license and had simply failed to secure one, as well as because most of these claimants had admitted to engaging in transactions with Cuban nationals. (SPA 34-35).

A number of Adverse Claimants filed notices of appeal (JA 731, 739, 743). The United States subsequently filed a motion for leave to file an *amicus curiae* brief on or before July 9, 2012, which this Court granted by order dated May 23, 2012. (Dkt. No. 73).

Summary of Argument

Plaintiffs seek to satisfy a judgment obtained against Cuba by attaching blocked EFTs held by various New York banks. The district court erred by concluding that the EFTs were subject to attachment under TRIA merely by virtue of being blocked under the Cuban Assets Control Regulations, without considering whether Cuba or any Cuban agency or instrumentality had any ownership interest in each blocked EFT at issue. The district court's holding is inconsistent with TRIA's statutory language, which renders eligible for

attachment only property "of" the relevant terrorist party, and is further undermined by well-established case law confirming the intuitive idea that statutory references to property "of" a party concern only property in which that party owns a property interest. Moreover, the district court's holding disregarded the fact that the CACR, by design, apply extraordinarily broadly, and are not limited to property in which Cuba (or its agencies or instrumentalities) has any ownership interest.

TRIA authorizes plaintiffs who have obtained a judgment against a "terrorist party" to execute that judgment by attaching certain assets that are subject to an OFAC blocking regulation or order. But TRIA's terms permit attachment only of "the blocked assets *of* [the] terrorist party." TRIA § 201(a) (emphasis added). The district court, in an attempt to square its ruling with this statutory language, adopted a strained and unpersuasive interpretation of TRIA's language to mean blocked assets under the sanctions regime associated with the judgment debtor terrorist party. But doing so wrongly departed from the far simpler and more natural reading that TRIA permits attachment of blocked assets in which the terrorist party has an ownership interest. In further contrast to the district court's interpretation, nothing in TRIA gives judgment creditors a property interest in blocked assets greater than that of the terrorist party itself, and nothing in TRIA purports to subject property wholly owned by third parties to attachment. Had Congress intended TRIA to mean what the district court held, Congress could and would have said so directly.

Thus, the scope of the attachment authorized by TRIA is not coextensive with the scope of the CACR, which pre-date TRIA. Those regulations apply not only to assets of Cuba, but also to property in which Cuba or one of its nationals has had "any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 515.201(a). Congress used far less expansive language in TRIA, even though it was presumably aware that OFAC regulations, such as the Cuba regulations, often encompass assets in which a foreign state or person only has an attenuated interest that does not rise to the level of an ownership interest.

The statutory language reflects a legislative choice to focus TRIA's attachment authorization on the terrorist party itself, and not to extend it in the unpredictable, varied, and potentially problematic ways that could arise if TRIA were read more broadly. The district court's ruling improperly disregarded this legislative determination, thereby not only departing from the statute's text but also causing harms including the imposition of potentially heavy costs on non-terrorist property owners whom Congress did not contemplate as sources for collection under TRIA.

ARGUMENT

TRIA AUTHORIZES ATTACHMENT ONLY OF PROPERTY IN WHICH A TERRORIST PARTY HAS AN OWNERSHIP INTEREST

TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party

(including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (28 U.S.C. § 1610 note). Thus, under TRIA, if plaintiffs could demonstrate that the blocked EFTs at issue are the assets "of" Cuba, and if those assets are "blocked" under a TWEA or IEEPA sanctions program, plaintiffs would be able to attach the assets notwithstanding provisions of the FSIA that would otherwise preclude the attachment. The district court, however, declined to require any demonstration of Cuban ownership of the EFTs in question, instead deeming TRIA to apply to *all* assets blocked under the CACR. (JA 279; *see also* SPA 25-26, 36).

Contrary to plaintiffs' contentions and the district court's ruling below, TRIA does not permit attachment of the EFTs at issue if Cuba or one of its agencies or instrumentalities does not have an ownership interest in those assets. It is not sufficient that the assets might have been subject to the relevant OFAC blocking regulation, which blocks all property in which Cuba or any Cuban national has "any interest of any nature whatsoever." 31 C.F.R. § 515.201.

This is so because the language of TRIA section 201(a) does not extend as broadly as the language of OFAC's blocking regulation, which existed before Congress enacted TRIA. TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets *of* that terrorist party (including the blocked assets *of* any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). TRIA does not employ the more expansive terms used not only in the Cuban asset blocking regulation, but in many other OFAC

regulations as well. *See, e.g.*, 31 C.F.R. § 515.201 (CACR, which apply to property in which Cuba or a Cuban national has had "any interest of any nature whatsoever"); *id.* §§ 538.201, 538.307 (Sudan sanctions, which apply to property in which the Sudanese government has "an interest of any nature whatsoever"); *id.* §§ 594.201, 594.306 (blocking property in which various specially designated global terrorists have "an interest of any nature whatsoever"); *id.* § 535.201 (Iranian blocking regulations likewise blocking certain property in which Iran has "any interest of any nature whatsoever"). When it enacted TRIA, Congress was presumably aware of the more expansive language used in such regulations, *see, e.g.*, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 62 n.2 (2d Cir. 2012) (concurring opinion, noting that, when Congress enacted legislation, it "was surely well aware" of operation of relevant pre-existing regulations), and this Court should not effectively amend the statute to incorporate the broader language that Congress chose not to employ.

Case law in a variety of contexts supports the intuitive conclusion that assets "of" Cuba are a narrower category than assets in which Cuba has "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the " 'use of the word 'of' denotes ownership.' " *Stanford*, 131 S. Ct. at 2196 (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also id.* (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of

the United States" to mean "works belonging to the United States" (internal quotation marks omitted)). Applying that understanding in interpreting a disputed provision of patent law, the Court in *Stanford* concluded that "invention of the contractor" is naturally read to mean "invention owned by the contractor" or "invention belonging to the contractor." 131 S. Ct. at 2196.

In contrast, in *United States v. Rodgers*, the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest, but the relevant statute permitted execution with respect not only to "any property, of whatever nature, *of* the delinquent," but also to property "*in which* he has *any* right, title, or interest." 461 U.S. 677, 692-94 (1983) (quoting 26 U.S.C. § 7403(a) (emphases added)). In so holding, the Court found important that the statute at issue included this broader second clause. *Id.* TRIA, of course, omits any such additional phrase, and instead applies only to the blocked assets "of" a terrorist party. *See* TRIA § 201(a).

Plaintiffs' proposed reading would also expand the statute well beyond common law principles regarding execution of a judgment against property in the possession of a third party. As both the majority and the dissent recognized in *Rodgers*, it "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50

C.J.S. Judgments § 787 (2012) ("A judgment lien attaches only to the judgment debtor's interest . . . . Stated another way, a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor." (citations omitted)). Congress enacted TRIA against the background of these principles, and the legislation should be interpreted to be consistent with these common-law precepts. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991); *see also United States v. Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) ("Congress will be presumed to have legislated against the background of our traditional legal concepts. . . ." (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978))). The plaintiffs' interpretation runs against these principles because it would let a judgment creditor attach an entire asset, and not just the judgment debtor's interest.

Finally, plaintiffs' broad reading does little to advance TRIA's aim of punishing terrorist entities or deterring future terrorism. As Senator Harkin observed, "making the state sponsors [of terrorism] actually lose" money will be a particularly effective deterrent against future terrorist acts. 148 Cong. Rec. S11,527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). Yet paying judgments from assets that are *not* owned by the terrorist party does not impose a similar cost on the terrorist party. It does, however, impose a heavy cost on non-terrorist property owners—and not a cost that Congress demonstrably chose to impose.

The district court's analysis (JA 282-303, SPA 14-29)* simply cannot be squared with TRIA's language, and the recent decision from the Southern District of New York being heard in tandem with this appeal correctly rejected *Hausler*'s reasoning. *See Calderon-Cardona*, 2011 WL 6155987, at *8-14.

In its initial opinion, the *Hausler* district court provided no explanation why, if its reading of TRIA were correct, Congress had used the narrow phrase "blocked assets of that terrorist party" in section 201(a), and not the broader (and simpler) phrase "blocked assets." (JA 282-86). In its subsequent ruling on the turnover petitions, responding to criticism of its analysis by the court in *Calderon-Cardona*, *see* 2011 WL 6155987, at *13, the *Hausler* court suggested that TRIA refers to assets "of that terrorist party" merely to clarify that a plaintiff can attach only assets that are blocked under "the particular regulation or administrative action directed at the particular . . . judgment debtor." (SPA 25). In other words, the *Hausler* district court opined that Congress used narrower language in TRIA than in OFAC's blocking regulations so as to establish that Cuba's judgment creditors can pursue only assets blocked under a Cuban sanctions scheme and cannot pursue assets blocked under, for example, sanctions targeting Iran. (SPA 25-26).

But this is a strained and unpersuasive reading of the language that Congress employed, which, as

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* *Accord Levin v. Bank of New York*, No. 09 Civ. 5900, 2011 WL 812032, at *14-17 (S.D.N.Y. Mar. 4, 2011).

discussed above, both intrinsically and as interpreted by prior case law (in other contexts) connotes an ownership interest held by the terrorist party that the asset in question is "of." Moreover, the district court's reading also is implausible because there is no reason to believe that Congress saw any need to specify so obvious a proposition, *i.e.*, that terror victims with judgments against terrorist parties could look for relief to assets blocked by a sanctions regime but only if that regime as a whole targets the relevant terrorist nation or parties. And, even if Congress could have believed it necessary to specify that TRIA was authorizing terrorism victims to collect only from funds blocked under sanctions regulations that relate to the responsible sanctioned nation or parties, TRIA should not be so interpreted because its language serves this supposed purpose obliquely if at all, and because a far more natural reading is that TRIA applies to assets in which the judgment debtor terrorist party has an ownership interest. At bottom, the district court below impermissibly and implausibly equated assets "of that terrorist party" with assets "blocked under the sanctions regime associated with that terrorist party."

The district court's interpretation also misapprehends how sanctions regimes function. Some blocking regimes, including those relating to Cuba, apply not just to a terrorist country itself, but also to any national of that country. *See, e.g.*, 31 C.F.R. § 515.201. That assets of foreign nationals are subject to a blocking regulation directed at a particular country does not necessarily make those assets the property of that nation. Moreover, some blocking regimes are not directed at an individual terrorist entity, and are instead directed at certain categories of terrorist

entities—many of which have nothing to do with each other. For instance, hundreds of different terrorist entities and individuals have their assets blocked under Executive Order 13,224, which targets terrorists across the globe. *See* 68 Fed. Reg. 34,196 (June 6, 2003); OFAC, *Terrorism: What You Need To Know About U.S. Sanctions* (hereinafter "*Terrorism*"), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf, at 2-24 (last updated June 29, 2012). Entities currently blocked under this program include such diverse groups as the FARC (a Colombian narco-terrorist organization, *see Tamara-Gomez v. Gonzales*, 447 F.3d 343, 345 (5th Cir. 2006)), the Tamil Tigers (a violent Sri Lankan rebel group, *see Don v. Gonzales*, 476 F.3d 738, 739 (9th Cir. 2007)), and Al-Qaida. *Terrorism* at 2, 54. The district court's logic would suggest that an individual with a judgment against one of these entities would be able to attach assets wholly owned by an entirely separate group, half a world away, whose only connection is that both have their assets blocked under the same broad sanctions regime. The absurdity that Congress intended such a result in enacting TRIA counsels against the district court's flawed interpretation.

While these considerations alone are dispositive, the United States notes that the *Hausler* district court further erred by mischaracterizing the relationship between OFAC sanctions regimes and existing sources of property law, and based on that overbroad understanding concluded that TRIA's reference to OFAC's sanctions had preemptive effect over concepts of state property law. (JA 279-85). While the Government takes no position here on TRIA's preemptive force, we note that neither TRIA nor

OFAC's regulations attempt to define whether particular assets are "of" or "owned by" a terrorist party. Accordingly, neither the statutory text nor the regulations support the district court's assertion that TRIA somehow itself opens up attachment more broadly than to blocked assets "of" a terrorist party. Instead, while OFAC's regulations contain definitions for terms like "property" and "interest," *see, e.g.*, 31 C.F.R. §§ 515.311, 515.312; *id.* §§ 535.311, 535.312, the purpose of those definitions is to explain the kinds of assets that come within OFAC's various blocking orders —orders that extend beyond assets owned by the relevant sanctions target. *See, e.g.*, 31 C.F.R. § 515.201 (barring transactions in "property" in which Cuba or one of its nationals has had an "interest"); *id.* § 535.201 (barring transactions in "property" in which Iran has an "interest"). These provisions serve purposes unrelated to TRIA's attachment authorization, and so are not a logical source to draw upon in determining how TRIA section 201 is to operate.

Finally, the *Hausler* district court mistakenly believed that its conclusions were needed to ensure that the success of a TRIA execution did not depend on which state happened to be the forum in an attachment proceeding. (SPA 17). If TRIA did preempt state law in any respect, and if such uniformity were a concern, courts could achieve the desired uniformity through the development of federal common law or its functional equivalent to govern attachment, without disregarding common law norms of attachment and execution, and without misconstruing TRIA's language as calling for an expansion of collection remedies to the outer bounds of whatever property is blocked under the relevant IEEPA or TWEA program. *See, e.g.*, *Burlington Indus.*

v. Ellerth, 524 U.S. 742, 754-55 (1998) (where Congress instructed that Title VII was to incorporate principles of agency yet uniform standards were needed, "a uniform and predictable standard must be established as a matter of federal law"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (in construing federal statute that uses common law terms, court relied on "general common law of agency, rather than on the law of any particular state").* There is no need—and no justifiable basis—to force OFAC's regulations into serving a role they were not intended to perform, and the district court's having done so was error.

CONCLUSION

For the foregoing reasons, the Court should hold that TRIA authorizes attachment only of assets in which the relevant terrorist party has an ownership interest, and should hold that the mere fact that an asset has been blocked under OFAC regulations does not establish that the asset is "of" a terrorist party for purposes of TRIA.

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* As noted, the United States takes no position on whether TRIA has preemptive force. If TRIA did have such effect, however, and if there were a legitimate risk to uniformity of outcomes posed by reference to state laws of attachment, that concern could be addressed through means other than the misapplication of OFAC regulations. A court could look to other sources, such as potentially the Uniform Commercial Code, in developing federal common law.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 5,876 words in this brief.

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